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Choong Shin Cheong v Suruhanjaya Syarikat Malaysia & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(NCVC)(W)-613–10 OF 2018
ZALEHA YUSOF, YAACOB MD SAM AND LAU BEE LAN JJCA
30 JUNE 2020

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Companies and Corporations — Liquidator — Appointed by court — Application for directions to rectify company's share register — Whether court should apply discretion to rectify — Application dismissed — Appeal — Whether trial judge erred in not taking into account unchallenged evidence of PW1, company's former lawyer in land transaction — Whether trial judge erred in not taking into consideration conflicting evidence of witnesses and contemporaneous documents to extent as required — Shares — Issue of shares — Whether allotment of 21,000 unit shares to Chee Chooi Fun was without consideration — Whether Chew Ah Fock and Chee Chooi Fun had contributed any consideration that could entitle either of them to the 21,000 unit shares issued by company — Transfer of shares — Whether Chee Chooi Fun had legal title over 21,000 unit shares — Whether cancellation of share certificate indicated that Chee Chooi Fun had no legal title over the 21,000 unit shares — Whether transfer of shares was valid — Financial assistance for purchase of company's shares — Whether unit shares issued by way of 'capitalisation' was valid — Whether the 469,998 unit shares issued by way of capitalisation was valid — Whether there was sufficient cause to exercise discretion to order rectification of share register

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Pentamont Development Sdn Bhd ('the company') was wound up by a court order on 1 October 2014. The court order appointed Cheong Shin Cheong ('the plaintiff') as the liquidator. The plaintiff filed an originating summons ('the OS') seeking directions to rectify the shares registered pursuant to s 162 of the Companies Act 1965 ('the Act'). The OS was later converted to a writ application. By way of this application against the Companies Commission of Malaysia ('CCM') as the defendant, the plaintiff sought a rectification of the company's share register. The rectification was to reflect the composition of the company shares as at 2002 and to cancel or expunge shares all other shares issues thereafter. The shareholders and their shareholdings were as follows in 2002: Chan Pak Woh (4,501 unit shares), Ong Siang Tian (4,500 unit shares) and Chee Chooi Fun (1 unit share). Pursuant to a directors' resolution to increase the company's shares to 30,002 units as paid up capital, the composition of shares changed to Chan Pak Woh holding 4,501 unit shares, Ong Siang Tian holding 4,500 unit shares and Chee Chooi Fun now holding 21,001 unit shares. Subsequently, Chee Chooi Fun transferred 21,001 units of

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her shares to her husband, Chew Ah Fock. The company then allotted another 469,998 shares (the total shares became 500,000 unit in total) by way of capitalisation of a property. The capitalisation involved the purchase of a piece of land in Johor Bahru ('the land') by the company and at all material times the land remained the property of the company. The company proceeded with the additional allotment of shares by registering the return of the allotment of shares ('Form 24') signed by Chee Chooi Fun. The Form 24 filed with the CCM showed the new composition of shares as follows: Chan Pak Woh holding 70,499 unit shares, Ong Siang Tian holding 70,500 unit shares and Chee Chooi Fun now holding 328,999 unit shares. It was the plaintiff's case that the allotment of 21,000 unit shares to Chee Chooi Fun was without consideration and without share certificate and the transfer of 21,000 unit shares to Chew Ah Fock was invalid and not in accordance to law. The plaintiff also submitted that the 469,998 unit shares issued by way of 'capitalisation' was invalid and not in accordance to law. The trial judge found that the documents submitted to and accepted for registration by CCM had not been set aside and acknowledged that CCM was merely a statutory body which fulfilled the function of a depository for documents under the Act. The High Court thus dismissed the plaintiff's application with costs of RM20,000. The dissatisfied plaintiff has filed an appeal against the decision of the High Court. The plaintiff maintained that the court should exercise its discretion to rectify the company's share register. The CCM submitted that it had no power to amend the share register or to expunge company documents lodged with it unless there was a court order directing it to do so.

Held, allowing the appeal with each party bearing its own costs:

(1) In this instant appeal the plaintiff was seeking a rectification of the share register to the composition of shares held by the shareholders in 2002 pursuant to s 162 of the Act. In order to establish that the allotment of 21,000 unit shares to Chee Chooi Fun was without consideration and the later transfer of 21,000 unit shares to Chew Ah Fock was invalid and not in accordance to law, the plaintiff relied on the unchallenged evidence of PW1, Abdullah Abdul Rahman of Messrs Abdullah & Maznah, the company's previous lawyer in the land transaction, in which the company was the purchaser. PW1 had testified and stated that Chew Ah Fock met him to sign the receipt which was photostated and had been replaced because the original receipt was lost. PW1's firm had issued two official receipts for the two payments issued to Chee Chooi Fun under her personal name confirming that payment in cash had been made by her for the said paid-up share. However, there was a dispute as to the marking of the two documents, which relate to the cash payment of RM30,000 and RM10,000 allegedly paid by Chee Chooi Fun to PW1's firm. As the submissions of Chew Ah Fock on the two documents, which relate to the

cash payment of RM30,000 and RM10,000, are totally opposed to the evidence of PW1 regarding the two documents, it was vital for Chew Ah Fock to put his case to PW1 during cross-examination. However, this was not done at trial, and this meant that PW1's evidence regarding the same was deemed admitted. In the circumstances, the trial judge had erred in that he had not taken into account the unchallenged evidence of PW1 (see paras 32–35).

(2) Regarding the necessity of testing the veracity of witnesses' testimony against the backdrop of contemporaneous documents in the face of conflicting evidence, it was settled law that in cases where there was conflicting evidence, it was the duty of the court to not only weigh such evidence on a balance of probabilities but it also look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In the present case, the trial judge had erred in that he had not taken into account the unchallenged evidence of PW1, the conflicting evidence of the witnesses and the contemporaneous documents to the extent as required. Thus, it was clear that Chew Ah Fock and Chee Chooi Fun had not contributed any consideration that could entitle either of them to the 21,000 unit shares issued by the company (see paras 36 & 38–41).

(3) In the present case, the plaintiff had highlighted to the court that the share certificate for the 21,000 unit shares to Chee Chooi Fun had been cancelled and that with the cancellation of the share certificate, Chee Chooi Fun had no legal title over the 21,000 unit shares. It was clear that a share certificate was equivalent to the legal title of the shares and was not just a formality. Thus, the cancellation of the share certificate indicated that Chee Chooi Fun had no legal title over the 21,000 unit shares. As Chee Chooi Fun had no legal title over the 21,000 unit shares, due to the cancellation of the share certificate, the 21,000 unit shares allotted to her was invalid and was not in accordance with the law. Consequently, Chee Chooi Fun did not have legal title of the 21,000 unit shares to transfer to Chew Ah Fock (see paras 42 & 46–47).

(4) Based on the concession made by Chew Ah Fock that there was no consideration from the shareholders for the allotment of 468,998 unit shares, it became clear that the amount of shares to be cancelled or expunged was 468,998 shares (RM1 unit per share). The purchase of the shares by the shareholders with the financial assistance provided by the company (whether directly or indirectly) was prohibited by s 67 of the Act. As such, the 469,998 unit shares issued by way of capitalisation was invalid. There was sufficient cause for this court to exercise its discretion to order the rectification of the share register (see paras 49–50, 53 & 60).

[Bahasa Malaysia summary

Pentamont Development Sdn Bhd ('syarikat') digulungkan dengan perintah mahkamah pada 1 Oktober 2014. Perintah mahkamah melantik Cheong Shin Cheong ('plaintif') sebagai pelikuidasi. Plaintif memfailkan saman pemula ('SP') yang meminta perintah untuk membetulkan saham yang didaftarkan menurut s 162 Akta Syarikat 1965 ('Akta'). SP kemudian ditukar menjadi permohonan writ. Dengan permohonan ini terhadap Suruhanjaya Syarikat Malaysia ('SSM') sebagai defendan, plaintif memohon pembetulan daftar saham syarikat. Pembetulan itu adalah untuk mencerminkan komposisi saham syarikat pada tahun 2002 dan untuk membatalkan atau mengeluarkan terbitan saham lain selepas itu. Pemegang saham dan pegangan saham mereka adalah seperti berikut pada tahun 2002: Chan Pak Woh (4,501 unit saham), Ong Siang Tian (4,500 unit saham) dan Chee Chooi Fun (1 unit saham). Berdasarkan resolusi pengarah untuk meningkatkan saham syarikat kepada 30,002 unit sebagai modal berbayar, komposisi saham tersebut berubah menjadi Chan Pak Woh yang memegang 4,501 unit saham, Ong Siang Tian memegang 4,500 unit saham dan Chee Chooi Fun kini memegang 21,001 unit saham. Selepas itu, Chee Chooi Fun memindahkan 21,001 unit sahamnya kepada suaminya, Chew Ah Fock. Syarikat kemudian memperuntukkan 469,998 saham tambahan (jumlah keseluruhan saham menjadi 500,000 unit) dengan menggunapakai modal hartanah. Permodalan tersebut melibatkan pembelian sebidang tanah di Johor Bahru ('tanah') oleh syarikat dan pada setiap masa yang tersebut tanah tersebut tetap menjadi hak milik syarikat. Syarikat meneruskan peruntukan saham tambahan dengan mendaftarkan peruntukan saham ('Form 24') yang ditandatangani oleh Chee Chooi Fun. Borang 24 yang diajukan kepada SSM menunjukkan komposisi saham baru seperti berikut: Chan Pak Woh memegang 70,499 unit saham, Ong Siang Tian memegang 70,500 unit saham dan Chee Chooi Fun kini memegang 328,999 unit saham. Ia adalah kes untuk plaintif untuk menunjukkan bahawa 21,000 unit saham kepada Chee Chooi Fun adalah tanpa balasan dan sijil saham dan pemindahan 21,000 unit saham kepada Chew Ah Fock tidak sah dan tidak mengikut undang-undang. Plaintif juga mengemukakan bahawa 469,998 unit saham yang diterbitkan dengan cara 'permodalan' adalah tidak sah dan tidak sesuai dengan undang-undang. Hakim perbicaraan mendapati bahawa dokumen yang diserahkan kepada dan diterima untuk didaftarkan oleh SSM belum ditolak dan mengakui bahawa SSM hanyalah badan berkanun yang memenuhi fungsi simpanan untuk dokumen di bawah Akta. Oleh itu, Mahkamah Tinggi menolak permohonan plaintif dengan kos RM20,000. Plaintif yang tidak berpuas hati telah mengemukakan rayuan terhadap keputusan Mahkamah Tinggi. Plaintif berpendapat bahawa mahkamah harus menggunakan budi bicaranya untuk membetulkan daftar saham syarikat. SSM mengemukakan bahawa ia tidak memiliki kuasa untuk mengubah daftar saham atau membuang dokumen syarikat yang diserahkan kepadanya kecuali ada perintah mahkamah yang

A mengarahkannya untuk melakukan perkara tersebut.

Diputuskan, membenarkan rayuan dan setiap pihak menanggung kos masing-masing:

B (1) Dalam rayuan ini, plaintif meminta pembetulan pendaftaran saham terhadap komposisi saham yang dipegang oleh pemegang saham pada tahun 2002 berdasarkan s 162 Akta. Untuk membuktikan bahawa peruntukan 21,000 unit saham kepada Chee Chooi Fun adalah tanpa balasan dan pemindahan 21,000 unit saham kemudiannya kepada Chew Ah Fock tidak sah dan tidak mengikut undang-undang, plaintif C bergantung pada bukti PW1, Abdullah Abdul Rahman dari Tetuan Abdullah & Maznah, peguam syarikat sebelumnya dalam transaksi tanah di mana syarikat itu adalah pembeli, yang tidak ditentang, PW1 telah memberi keterangan dan menyatakan bahawa Chew Ah Fock menemuinya untuk menandatangani resit yang difotostat dan telah D diganti kerana resit asalnya telah hilang. Firma PW1 telah mengeluarkan dua resit rasmi untuk dua pembayaran yang dikeluarkan kepada Chee Chooi Fun dengan nama peribadinya yang mengesahkan bahawa pembayaran secara tunai telah dibuat olehnya untuk bahagian saham berbayar tersebut. Namun, terdapat pertikaian mengenai penandaan dua E dokumen tersebut, yang berkaitan dengan pembayaran tunai RM30,000 dan RM10,000 yang didakwa dibayar oleh Chee Chooi Fun kepada firma PW1. Oleh kerana hujahan Chew Ah Fock berkenaan dua dokumen tersebut, yang berkaitan dengan pembayaran tunai RM30,000 dan RM10,000, sama sekali menentang bukti PW1 mengenai dua F dokumen tersebut, sangat penting bagi Chew Ah Fock untuk mengemukakan kesnya terhadap PW1 semasa pemeriksaan balas. Namun, ini tidak dilakukan pada perbicaraan, dan ini menunjukkan bahawa bukti dikemukakan oleh PW1 mengenai hal itu dianggap diakui. Dalam keadaan itu, hakim perbicaraan telah terkhilaf kerana tidak G mempertimbangkan bukti PW1 yang tidak ditentang (lihat perenggan 32–35).

(2) Berkenaan perlunya menguji kebenaran testimoni saksi dengan latar belakang dokumen-dokumen di dalam bukti yang bertentangan, H undang-undang amat jelas bahawa jika ada bukti yang bertentangan, adalah tugas mahkamah untuk tidak hanya menimbang bukti keseimbangan kebarangkalian tetapi ia juga melihat semua faktor di sekitarnya dan untuk menimbang dan menilai dokumen yang cenderung untuk membuktikan kesahihan atau sebaliknya dari fakta tertentu. I Dalam kes ini, hakim perbicaraan telah khilaf kerana tidak mempertimbangkan bukti PW1 yang tidak ditentang, bukti dikemukankan oleh saksi yang bertentangan dengan dokumen yang diperlukan. Oleh itu, jelas bahawa Chew Ah Fock dan Chee Chooi Fun

tidak memberikan balasan apa pun yang boleh memberi hak kepada salah satu daripada 21,000 unit saham yang diterbitkan oleh syarikat itu (lihat perenggan 36 & 38–41).

(3) Dalam kes ini, plantif telah menyatakan kepada mahkamah bahawa sijil saham untuk 21,000 unit saham kepada Chee Chooi Fun telah dibatalkan dan akibat pembatalan tersebut, Chee Chooi Fun tidak memiliki hak yang sah terhadap 21,000 saham unit. Jelas bahawa sijil saham adalah setaraf dengan pegangan sah saham dan bukan hanya formaliti. Oleh itu, pembatalan sijil saham menunjukkan bahawa Chee Chooi Fun tidak mempunyai hak sah terhadap 21,000 unit saham. Oleh kerana Chee Chooi Fun tidak memiliki hak sah ke atas 21,000 unit saham, kerana pembatalan sijil saham tersebut, 21,000 unit saham yang diberikan kepadanya tidak sah dan tidak selari dengan undang-undang. Oleh itu, Chee Chooi Fun tidak mempunyai hak yang sah terhadap 21,000 unit saham untuk dipindahkan ke Chew Ah Fock (lihat perenggan 42 & 46–47).

(4) Berdasarkan konsesi yang dibuat oleh Chew Ah Fock bahawa tidak ada balasan dari para pemegang saham untuk penerbitan 468,998 unit saham, menjadi jelas bahawa jumlah saham yang akan dibatalkan atau dihapuskan adalah 468,998 saham (RM1 unit satu saham). Pembelian saham oleh pemegang saham dengan bantuan kewangan yang diberikan oleh syarikat (sama ada secara langsung atau tidak langsung) dilarang oleh s 67 Akta. Oleh itu, 469,998 unit saham yang diterbitkan dengan kaedah permodalan tidak sah. Terdapat alasan yang cukup untuk mahkamah ini menggunakan budi bicaranya untuk memerintahkan pembetulan perdaftarandaftar saham (lihat perenggan 49–50, 53 & 60).]

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1997] 3 MLJ 661; [1997] 1 MLRA 593, CA (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 1 MLRA 546, CA (refd)

Grant v John Grant & Sons Pty Ltd (1950) 82 CLR 1, HC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor Bin Haji Yakob & Ors [2000] 4 MLJ 433, CA (refd)

Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors [2007] 8 MLJ 50, HC (refd)

Pioneer Motor Service Co v Chin Cheng Hong Sdn Bhd [2003] 3 MLJ 513, CA (refd)

Peter Tham Wing Fai v PP [1988] 2 MLJ 424; [1988] 3 MLRH 200 (refd)

Société Générale de Paris and Colladon v Walker (1886) 11 App Cas 20, HL (refd)

Legislation referred to

Companies Act 1936 [AU] s 83(1)
Companies Act 1965 (repealed by Companies Act 2016) ss 11(10), (10)(a), (10)(b), 67(1), 100, 123, 162, 235, 236(1)
Companies Act 2016

Appeal from: Civil Suit No JA-22NCVC-223–11 of 2016 (High Court, Johor Bahru)

KS Pang (Sharmizah bt Hashim and Izzatul Amira bt Abd Samad with him) (Sharmizah, Izzatul Amira & Partners) for the appellant.
Mohd Zulkhairi bin Kamaruzaman (Rudaini Abdullah with him) (Companies Commission of Malaysia) for the first respondent.
Krishnan Narayanan Nair with him) (N Krishnan Nair & Co) for the second respondent.

Lau Bee Lan JCA:

INTRODUCTION

[1] This appeal was brought by the appellant/plaintiff against the decision of the learned judicial commissioner ('judge') made on 26 September 2018 who dismissed the appellant/plaintiff's claim against the first respondent/defendant with costs of RM20,000 to be paid by the former to the latter.

[2] We shall refer to the parties as they were in the court below.

[3] Having heard and considered the respective parties' oral and written submissions, we unanimously allowed the appeal. These are our reasons in respect of the appeal.

BRIEF FACTS

[4] The brief facts relevant to this appeal are these. On 1 October 2014, the plaintiff, Choong Shin Cheong (NRIC No 430327–08–5297) was appointed as the liquidator of Pentamont Development Sdn Bhd (No 580415-M) ('the company') vide court order dated 1 October 2014 under Companies Winding Up Petition No 28–235–11 of 2011 ('the court order').

[5] Vide the court order, the plaintiff has been given the power under ss 235 and 236(1) of the Companies Act 1965 ('the CA 1965') as a liquidator, among others, to get directions to rectify the shares registered pursuant to s 162 of the

CA 1965.

[6] The plaintiff then filed an Originating Summons No 24NCvC-395–06 of 2015 dated 23 June 2015 ('the OS') to maintain the registration of company shares back to the composition in the year 2002 as follows:

(a) Chan Pak Woh (4,501 unit shares);

(b) Ong Siang Tian (4,500 unit shares); and

(c) Chee Chooi Fun (1 unit share).

and to cancel or expunge shares other than the abovementioned shares (prayers 2 and 3 of the OS); and /or alternatively, the amount of shares to be cancelled or expunged is 490,998 shares (RM1 unit per share) (prayer 4 of the OS).

[7] The OS was later on converted to writ vide Civil Suit No 22NCvC-223–11 of 2016.

[8] The plaintiff named the Companies Commission of Malaysia ('CCM') as the defendant. The following interveners joined in the suit later as:

(a) Chan Pak Woh (NRIC No 600815–01–5123) — first intervener;

(b) Ong Siang Tian (NRIC No 470501–01–5961) — second intervener; and

(c) Chew Ah Fock (NRIC No 620722–06–5031) — third intervener.

[9] The directors' resolution for the allotment of shares dated 19 June 2002 and the return of the allotment of shares ('Form 24') signed by Chee Chooi Fun registered on 22 June 2002 was to increase the company's shares to 30,002 units as paid-up capital. The composition of shares after the said registration is as follows:

(a) Chan Pak Woh (4,501 unit shares);

(b) Ong Siang Tian (4,500 unit shares); and

(c) Chee Chooi Fun (21,001 unit shares).

[10] On 25 July 2008, Chee Chooi Fun transferred 21,001 units of her shares to her husband, Chew Ah Fock, the second respondent/third intervener.

[11] The company further allotted another 469,998 shares (the total shares became 500,000 unit in total) by way of capitalisation of a property described

as HS(M) 333, Lot No MLO 6025, Mukim of Plentong, Tempat of Kg Telok Jawa, Masai, District of Johor Bahru, Johor ('the land'). Thereafter, the portion of shares stated in the Return of Allotment of Shares ('Form 24') registered on 18 February 2009 is as follows:

(a) Chan Pak Woh (70,499 unit shares);

(b) Ong Siang Tian (70,500 unit shares); and

(c) Chew Ah Fock (328,999 unit shares).

[12] The company has taken up loan from RHB to finance the purchase of the land. The sale and purchase agreement and the supplementary agreement both dated 12 June 2002 was between the Vendor, Jamilah @ Jamelah bt Md Yatim and the company. As such, the land is at all time the asset/property of the company.

[13] The first and second interveners were struck out as interveners when the trial begin.

[14] The learned judge dismissed the plaintiff's claim after a full trial. Hence this appeal by the plaintiff.

PRIMARY ISSUES IN THIS APPEAL

[15] The grounds in the memorandum of appeal of the plaintiff can be summarised to three main issues:

(a) the allotment of 21,000 unit shares to Chee Chooi Fun is without consideration and without share certificate and the transfer of 21,000 unit shares to Chew Ah Fock is invalid and not in accordance to law ('first issue');

(b) the 469998 unit shares issued by way of 'capitalisation' is invalid and not in accordance to law ('second issue'); and

(c) failure to consider the power and duties of the liquidator ('third issue').

[16] However during oral submission, the plaintiff's counsel informed the court that the plaintiff had only two issues, ie the first and second issues.

[17] We are of the view that the first and second issues form the basis of the core issue in the plaintiff's claim of whether there is a mistake in the share register of the company and even if a situation giving cause for rectification exists, whether it warrants the court to exercise its discretion to order rectification of the register under s 162 of the CA 1965.

OUR DECISION

[18] It will be useful to reproduce s 162 of the CA 1965 upon which the plaintiff's application was premised on and which forms the subject matter of this appeal which reads:

> 162 Power of Court to rectify register.
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> (1) If —
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> (a) the name of any person is without sufficient cause entered in or omitted from the register; or
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> (b) default is made of unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,
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> the person aggrieved or any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.
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> (2) On any application under subsection (1) the Court may decide —
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> (a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and
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> (b) generally, any question necessary or expedient to be decided for the rectification of the register.
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> (3) The Court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.
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> (4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the Court.

[19] In its written submission, CCM stated, among others, that based on the statutory documents of the company lodged with CCM, the changes in the number and ownership of the shares of the company are as follows:

Document	Document date	Number of shares	Total of shares
Form 24	16 May 2002	Founder's shares — RM2	
		Shareholder:	
		1. Yap Liee Mee (671129–10–6082)	1
		2. Loh Kuan Chween (710210–08–5441)	1

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Form 24	19 June 2002	New shares allotment (RM30,000) — CASH New shareholder: 1. Chee Choi Fun (640324–08–6476) 2. Chan Pak Who (600815–01–5123) 3. Ong Siang Tian (470501–01–5961) Thus, the company has a total paid-up share capital of RM30,002	 21,000 4,500 4,500 30,000
Amendment Form 24	17 April 2007	There was an amendment made: The amendment involves the total paid-up share capital of Form 24 dated 19 June 2002. In the statutory declaration dated 17 April 2007, Chee Choi Fun declared that there was a mistake in the total paid-up capital of the company in Form 24 dated 19 June 2002 which was recorded 35,002. The total paid-up capital of the company should be RM30,002.	
Form 28 Form 24 Form 25	18 February 2009 18 February 2009 18 February 2009	There is a Form 28 for increase in authorized share capital on 18 February 2009. Thus the authorized share capital of the company is RM500,000. New shares allotted (RM469,998) — OTHERWISE THAN CASH 1. Chew Ah Fock (620722–06–5031) 2. Chan Pak Woh	 328,999 70,499

		(600815–01–5123) 3. Ong Siang Tian (470501–01–5961) On 18 February 2009, the total authorised share capital of the company is RM500,000 with cash share amounting to RM30,002 and otherwise than cash amounting to RM469,998.	 70,500 469,998
Annual Return 2012	5 April 2012	Shareholder's position: 1. Chew Ah Fock (620722–06–5031) 2. Chan Pak Woh (600815–01–5123) 3. Ong Siang Tian (470501–01–5961) On 5 April 2012, the total authorised share capital of the company is RM500,000 with cash share amounting to RM30,002 and otherwise than cash amounting to RM469,998. As such, the list of shareholder is as per the annual return dated 5 April 2012.	 350,000 75,000 75,000 500,000

For ease of reference we shall call it 'CCM Table'.

[20] Briefly, in its written submission, CCM submitted the judge's decision ought not to be disturbed for, among others, the following reasons:

(a) CCM has no power to amend the share register and/or to expunge company documents lodged with CCM unless there is a court order directing it to do so and cited the case of *Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors* [2007] 8 MLJ 50, held 1;

(b) the changes of shares that occur (if any) in the company affairs is beyond the control of CCM as CCM will only register the documents lodged if they are proper; and

(c) CCM agreed with the findings by the learned judge in paras 22–24 and 39 of the grounds of decision ('grounds') that essentially the documents submitted to and accepted for registration by CCM had not been set aside and acknowledged that CCM was merely a statutory body which fulfilled the function of a depository for documents under CA 1965 and

A now CA 2016.

[21] In addition by way of oral submission, learned counsel for CCM, Encik Mohd Zulkhairi bin Kamaruzaman informed the court that CCM will abide by any order made by the Court.

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[22] The learned judge relied on the following dicta from the case of *Norakhmar bt Baharom* at p 50 held (1) and (2):

> (1) There is no provision under the law for expunging documents filed at the CCM. The CCM, apart from its many other functions, is a depository of company documents which members of the public may have access to. Any documents filed with the CCM must remain with the CCM save that under s 11(10) of the Act, any person aggrieved by the decision of Registrar of Companies to accept or reject documents filed with the registry may within 30 days of the decision of the registrar apply to the court to challenge the decision of the registrar. Where no court application has been initiated under this provision, the documents will have to remain as a permanent record at the CCM (see para 10).
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> (2) It follows, therefore, that the plaintiffs' application to expunge those documents already filed by the company during the directorship of the fourth defendant is misconceived (see para 11).
>
> (para 21 grounds)

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[23] The case of *Norakhmar bt Baharom* concerned an application by the plaintiffs to not only seek expungement of documents filed by the company under the directorship of the fourth defendant (bankrupt director) but also seek the removal of the director himself and the company secretaries appointed by him (ie first and second defendants). We have no reason to disagree with the aforesaid findings of the High Court in *Norakhmar bt Baharom* in the context of the expungement of documents except to the 'carve out' which we shall explain hereafter.

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[24] In *Norakhmar bt Baharom*, the High Court referred to the appeal provision available to the person aggrieved with the decision of the Registrar of Companies to accept or reject documents filed with the registry under s 11(10) of the CA 1965. Section 11(10) reads as follows:

H

> Appeal
>
> (10) Any person aggrieved by the refusal of the Registrar to register any corporation or to register or to receive any document or by any act or decision of the Registrar may appeal within thirty days of the decision of the Registrar to the Court which may confirm the refusal, act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this *subsection shall not apply to any act or decision of Registrar —*

I

(a) *in respect of which any provision in the nature of the appeal or review is expressly provided in this Act*; or

(b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing. (Emphasis added.)

[25] It is clear from a reading of the aforesaid provision that the appeal referred in s 11(10) of the CA 1965 shall be excluded when an act or decision of the registrar falls within the ambit of limb (a) or (b). In this instant appeal, what the plaintiff seeks is in essence a rectification of the share register to the composition of shares held by the shareholders in 2002 which the plaintiff has moved the court to do so under s 162 of the CA 1965. It is obvious from a reading of s 162 that it is a provision which falls within limb (a) of sub-s (10) of s 11 of the CA 1965 by virtue of the expressed wordings in s 162 that 'the person aggrieved or any member of the company may apply to the court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application'.

[26] For the reasons discussed, save for cognisance by the learned judge in the present appeal that apart from its many functions, CCM 'is a depository of company documents which members of the public may have access to', we are of the considered view that the learned judge's reliance on *Norakhmar bt Baharom* is misplaced.

[27] On the assumption the records kept by the Registrar of Companies of the company is correct, we shall for visual clarity refer to the CCM Table.

FIRST ISSUE

Allotment of 21,000 unit shares was without consideration

[28] Regarding the first issue, counsel for the plaintiff drew to our attention that in Form 24, return of allotment of shares registered on 22 June 2002, the total paid up capital was RM30,002 unit shares which included the 21,000 unit shares allotted to Chee Chooi Fun. The plaintiff argued that the issued shares were due and payable but Chee Chooi Fun has not paid for the 21,000 unit shares based on the unchallenged evidence of PW1, Abdullah Abdul Rahman of Messrs Abdullah & Maznah (the company's previous lawyer in charge of the land transaction, to wit, the company was the purchaser), given during cross-examination and which evidence was deemed admitted on the authority of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 1 MLRA 546 at pp 16–18 at pp 562–564.

[29] Counsel for the plaintiff drew to our attention the following evidence of PW1 during cross-examination at pp 39, 44 and 45 *Rekod Rayuan Tambahan Jld 1* which we agreed was not disputed nor challenged by the defendant:

(a) PW1 has never met Chee Chooi Fun;

(b) PW1 has never received cash of RM30,000 from Chee Chooi Fun;

(c) the handwriting on the receipts dated 23 May 2002 and 28 May 2002 was not the handwriting of PW1;

(d) it was impossible for PW1 to issue the receipts under the name of Chee Chooi Fun; and

(e) PW1 testified that Chew Ah Fock came and met with him one day. Chew Ah Fock brought with him a photocopied receipt (with the refilled wording). Chew Ah Fock asked PW1 to sign on that piece of photocopied receipt because he had misplaced the original receipt. PW2 signed on it and during his testimony in examination in chief, he admitted that he had made a mistake by signing on the photocopied receipt.

[30] Counsel for the plaintiff highlighted in para 16 of the grounds, the learned judge held that the payment of two cheques of RM25,000 each by the first and second interveners totalling RM50,000 to PW1 was not consistent with the reports and financial statements of the company which only recorded a sum of RM30,000 had been paid as capital.

[31] By concluding as he did in para 16 of the grounds, counsel for the plaintiff submitted the learned judge had erred in that:

(a) he had not taken into account the unchallenged evidence of PW1; and

(b) he failed to consider the following contemporaneous documents:

(i) a letter dated 28/5/2014 (exhibit P1) from PW1 addressed to the company confirmed that Chan Pak Woh and Ong Siang Tian (first and second interveners) had paid RM25,000 each via PBB Cheque No 508888 and HLB Cheque No 645636 respectively and that the RM50,000 was used for payment of the deposit for the land in accordance with the sale and purchase agreement and the balance of RM20,000 being part payment of the legal fees; and

(ii) the bank statement of Chan Pak Woh dated 20 June 2002 showed that the PBB cheque No 508888 for the sum of RM25,000 was cleared on 22 May 2002 and the cheque butt of HLB Cheque No 645636 showed RM25,000 was paid by Ong Siang Tian to the firm of PW1.

[32] We have perused the evidence in chief of PW1, a subpoenaed witness and we are satisfied that there was no cross-examination of PW1 by counsel for Chew Ah Fock. This is evident from the notes of proceedings (NOP) that the CCM legal officer requested the High Court to 'rekod untuk pencelah soal.' This was followed by the following NOP:

> Plaintiff Solicitor: Yang Arif, mengikut Aturan 35 Kaedah-Kaedah Mahkamah, sekiranya mana-mana pihak tidak hadir, pihak Mahkamah mempunyai hak untuk menidakkan rights mereka untuk menyoal saksi. Saya memohon agar saksi saya dilepaskan.
>
> Court: Baik. Terima kasih Encik Abdullah.

[33] We have analysed the evidence of Chew Ah Hock. Counsel for Chew Ah Fock submitted that PW1 was not creditworthy for reasons at paras 1–12, pp 18–20 of the second respondent's written submission. Of particular significance are the following submissions:

> [4] The issuance of the Official Receipt for the two (2) payments issued to Chee Chooi Fun under her personal name confirms the payment by cash had been made by her and these two (2) receipts formed the foundation on the claim as a contributory for the shares which form the audited proof of the payments made by Chee Chooi Fun for the said paid-up shares;
>
> [5] PW1 had testified and stated that Chew Ah Fock met PW1 to sign the receipt which was photostated and had been replaced for the reason that the Original is lost is not true since the original receipt of acknowledgement of the payment had been produced in Court. There is no necessity for a duplicate to be photostated and signed by PW1 which had been duly issued for the said payment. It is an 'after-thought' version and testimony by PW1 to deny the Second Respondent/Third Intervener of his rightful ownership of the paid-up shares. The Second Respondent/Third Intervener had produced the Original Receipt of payment to the Court and the Appellant/Plaintiff which confirms that it is the Original Receipts and not as alleged by the Appellant/Plaintiff which is baseless and is not credit worthiness;
>
> [7] In this circumstances what is there to challenge and dispute the testimony of PW1 who admits he cannot recollect;

[34] With respect, we find that the foregoing submissions made on behalf of Chew Ah Fock to be devoid of merit for the following reasons:

(a) there was a dispute as to the marking of the two documents which relate to the cash payment of RM30,000 and RM10,000 allegedly paid by Chee Chooi Fun to Messrs Abdullah & Maznah at pp 614 and 615 *Rekod Rayuan Jld 4 Bahagian C* (referred to as pp 8 and 9 Bundle J in NOP). The learned judge stated 'Lawyer [PW1] did not say that it is (sic) not exist. He need to verify the original'. The learned judge in his

own words said 'I will allow this marks (sic) as exhibit 16 and 17 but still put in submission. You can also submit on the truth of the document. You except it as the existence (sic) and you can still submit'.

On the probative value of the two documents which relate to the cash payment of RM30,000 and RM10,000 allegedly paid by Chee Chooi Fun to Messrs Abdullah & Maznah which we shall now refer as exhs 16 and 17, it shall be dealt with when we address the argument of the plaintiff that he failed to consider the contemporaneous documents; and

(b) the submissions of the counsel for Chew Ah Fock on the two documents which relate to the cash payment of RM30,000 and RM10,000 are totally opposed to the evidence of the PW1 regarding the two documents alluded in para 29 above. Therefore it was certainly vital for Counsel for Chew Ah Fock to put his client's case to PW1 during cross-examination. We find that this was unfortunately not done which meant that PW1's evidence regarding the same was deemed admitted on the authority of *Aik Ming*.

[35] By reason of paras 32–34 above we agreed with the submission of counsel for the plaintiff that the learned judge erred in that he had not taken into account the unchallenged evidence of PW1.

[36] Regarding the necessity of testing the veracity of witnesses' testimony against the backdrop of contemporaneous documents in the face of conflicting evidence, we are of the view that the case of *Guan Teik Sdn Bhd v Haji Mohd Noor Bin Haji Yakob & Ors* [2000] 4 MLJ 433 (cited by the plaintiff) is particularly relevant. In *Guan Teik Sdn Bhd*, this court had to determine whether the conclusion reached by the trial judge that it was a money lending transaction as opposed to a genuine outright sale of land, was correct by accepting the respondents' (vendors of the land) evidence to be the truth in light of the conflicting evidence adduced before him.

[37] We are in agreement with the approach adopted by this court which we can do no better than to reproduce what was expressed at p 439 G–I (per Siti Norma Yaakob JCA (as she then was) as follows:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the contemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. He should, after accepting the respondents' evidence, weighed it against the contemporaneous documents and evaluate whether such documents

support the respondents' oral testimony. We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents were issued.

[38] In this appeal before us, the application by the plaintiff is for rectification of the share register back to what it was in 2002 whereas the witnesses gave evidence at the trial in 2018. There is conflicting evidence wherein the learned judge said:

(i) The plaintiff had called Abdullah Bin Abdul Rahmah (PW1), who was the solicitor from the then legal firm of M/S Abdullah & Maznah, and who had handled the land transaction (which was the very purpose the company was acquired), to testify that the first and second interveners had each paid RM25,000 through his firm and had verified the receipts issued to the first and second Interveners. However, some receipts shown to PW1 as having been issued to the wife of the 3rd Intervener were not recollected, on the premise that cash payment of RM30,000 appeared to have been made, where PW1 had claimed that his firm would not receive large sums of cash as a matter of practice because he did not have staff to count such sums of cash (para 14 grounds);

(ii) While the plaintiff had introduced and highlighted the two cheque payments of RM25,000 from each of the first and second Interveners to the legal firm of PW1, the plaintiff (who had testified as PW2) had not been able to reconcile this with Reports and Financial Statements for the company, which had all the while only recorded that a sum of RM30,000 had been paid as capital. This would be consistent with the case of the 3rd Intervener, who claimed that a cash sum of RM30,000 had been paid to the firm of PW1. The absence of any reference to the sums that had purportedly been paid by the first and second Interveners to PW1 in the Reports and Financial Statements for the company had not been challenged by the plaintiff, or even separately by the first and second interveners (para 16 grounds);

(iii) The plaintiff has clearly taken the side of the first and second interveners by highlighting evidence favourable to them, such as only now producing the receipts for the RM25,000 payment from each of them to Messrs Abdullah & Maznah, and claiming that there was never any capital contribution by the third intervener and/or his wife, Chee Chooi Fun — not directly, but through the testimony of PW1, who could hardly remember even when testifying at wits end that his practice was not to receive large sums of cash (para 17 grounds);

(iv) The 2 receipts had then formed the foundation of the first and second interveners to argue that the third intervener was not a shareholder of the company as there was no proof of any payment made for those shares. The same argument was also mounted by the third intervener based on the Reports and Financial Statements for the company, which he had claimed

were audited proof that the first and second Interveners had not paid for their shares in the company (para 34 grounds); and

(v) On the aspect, I must note that cash in Ringgit Malaysia is legal tender. Unless the sum of RM30,000 was paid using small denomination five sen or ten sen coins, and manifestly unreasonable under the circumstances that maybe even fall outside the threshold limit constituting legal tender, I dare say the lawyer would be obliged to receive and cannot reject an payment using legal tender. It must be said that PW1 had never specifically denied his firm had received the cash payment of RM30,000 stipulated under the receipts (Exhibits '1-6' and '1-7') put up by the third intervener as proof of payment. PW1 had merely sidestepped the issue by saying that his legal firm's practice was not to receive large sums in cash. If RM30,000 would be considered a large sum, where grave difficulty would arise in counting the same, I would seriously wonder whether PW1 was actually running a professional legal firm. I am prepared, and I would think justifiably so, to attach sceptical weight to Abdullah's evidence (para 35 grounds).

[39] Regarding the submissions of counsel for Chew Ah Fock in para 33 above, it is our considered view that there is no merit whatsoever for these reasons:

(a) we find the learned judge's statement that 'The absence of any reference to the sums that had purportedly been paid by the first and second interveners to PW1 in the reports and financial statements for the company had not been challenged by the plaintiff' is wholly inaccurate. We observed counsel for plaintiff cross-examined Chew Ah Fock regarding the payments of RM25,000 in the context of the reports and financial statements for the company at pp 210 and 217 and Chew Ah Fock's answers were littered with 'I disagree.' We would not have expected him to say otherwise;

(b) the learned judge did make reference to the fact that PW1 was called to testify regarding the two cheque payments of RM25,000 each from the first and second interveners and in para 14, 16 and 34 of the grounds (see para 38 above). However we find the learned judge in the very same paragraphs of the grounds had accepted Chew Ah Fock's evidence regarding exhs 1-6 and 1-7 (see para 38 above) without considering and weighing the probative value and effect of the bank statement, PBB cheque No 508888 and the cheque butt of HLB Cheque No 645636 alongside the letter written by PW1 to the company and the contents therein (in para 31(b)(i) and (ii) above) and evaluate whether these contemporaneous documents had supported the plaintiff's case and discredited the evidence of Chew Ah Fock;

(c) it should not be forgotten that the evidence of PW1 was not challenged

and deemed to be admitted; and

(d) in light of the unchallenged evidence of PW1 and the contemporaneous documents, the payments of the first and second interveners and its purpose thereof referred in para 31(a)(i) above is in our view consistent with the financial statements of the company because they contributed RM30,000 towards the purchase price of the land on behalf of the company.

[40] In addition, we find there is no merit in counsel for Chew Ah Fock's submission that 'It is trite law that the impunge (sic) payments for the RM25,000 paid by cheques and said Cheque payments shall not be admissible and accepted' as it is but a bare statement without citing any authority to support the same. Further, such a submission would run contrary to the fact that learned Judge did refer to the two cheque payments of RM25,000 each by Chan Pak Woh and Ong Siang Tian (first and second interveners) in paras 14, 16 and 34 of the grounds, albeit we find His Lordship 'had failed to direct his mind as to the probative effect of the contemporaneous documents'.

[41] Premised on the discussion above, we agreed with the submission of counsel for the plaintiff that the learned judge erred in that he had not taken into account the unchallenged evidence of PW1 and the contemporaneous documents to the extent as explained. We accordingly concluded that Chew Ah Fock and Chee Chooi Fun had not contributed any consideration that could entitle either of them to the 21,000 unit shares issued by the company.

Cancellation of share certificate

[42] Counsel for the plaintiff highlighted to the court that the share certificate number 005 dated 19 June 2002 for 21,000 unit shares to Chee Chooi Fun was cancelled. Counsel argued with the cancellation of the share certificate number 005, Chee Chooi Fun has no legal title over the 21,000 unit shares. In support thereof, s 100 of the CA 1965 and the case of *Peter Tham Wing Fai v Public Prosecutor* [1988] 2 MLJ 424; [1988] 3 MLRH 200 were cited.

[43] Counsel for Chew Ah Fock submitted, among others, that: (i) the share certificate number 005 was prepared but not issued and had been tampered as it had not been sealed and signed by the company director and company secretary and was kept intact, unsealed and unsigned; and (ii) it was not genuinely issued but was forged which was highlighted at the trial. There is no specific finding of forgery as alleged by counsel for Chew Ah Fock in the grounds. Instead we noticed that all the learned judge stated is ' ... (the first

Intervener) has not recanted or disowned any of the documents (in the reports and financial statements for the company) whether on the basis of fraud, misrepresentation ...' (para 11 grounds).

[44] Section 100 of CA 1965 provides:

> 100(1) A certificate under the common or official seal of a company specifying any shares held by any member of the company shall be prima facie evidence of the title of the member to the shares.

[45] In *Peter Tham Wing Fai*, the appellant committed forgery by forging company share certificates and proceeded with 'blank transfers'.

He appealed against two rulings of the High Court of Singapore, one of which was whether a share certificate is a valuable security. The High Court held (p 269) that:

> The importance of the share certificate is clear. Without it, legal title does not pass. It gives the holder or possessor of the certificate the right to demand to be registered as a shareholder.

The High Court referred to the case of *Société Générale de Paris and Colladon v Walker* (1886) 11 App Cas 20 and stated:

> It was decided that a complete legal title to shares could not be acquired without registration and that in most cases registration can only take place upon production of the share certificate, and that a 'blank transfer' in itself is inadequate. The requirement that a share certificate be produced is more than a mere formality.

[46] Premised on the above, we are of the considered view that a share certificate is equivalent to the legal title of the shares and is not just a formality. Thus the cancellation of share certificate number 005 indicated that Chee Chooi Fun has no legal title over the 21,000 unit shares.

[47] In light of our findings that Chee Chooi Fun has no legal title over the 21,000 unit shares as the said shares were allotted to her was without consideration and due to the cancellation of share certificate number 005, we held that the 21,000 unit shares allotted to her was invalid and was not in accordance with the law. Consequently we held that Chee Chooi Fun did not have legal title of the 21,000 unit shares to transfer to Chew Ah Fock.

SECOND ISSUE

[48] Counsel for the plaintiff submitted that the issuance of 469,998 unit shares by way of capitalisation of the land vide lodgement of Form 24 filed by

the company was invalid and was not in accordance with the law due to reasons which the learned judge failed to take into account. The matters which were not considered are:

(a) although it was alleged that the issuance of 469,998 unit ordinary shares by the company was by way of capitalisation of the land but Chew Ah Fock received 328,999 ordinary shares from 469,998 ordinary shares without any payment to the company. Chew Ah Fock *never paid for the sum of RM328,999 or any sum at all* for the issuance of the ordinary shares;

(b) it is not disputed that the land was purchased and financed by a term loan of RM680,000 from RHB Bank;

(c) the land *was not purchased* by Chew Ah Fock or Chan Pak Woh or Ong Siang Tian and then transferred to the company for the issuance of shares by way of capitalisation;

(d) the issuance of 469,998 unit shares through capitalisation was *without any consideration* from the shareholders;

(e) *the company has paid for the purchase price of the land.* There was no consideration contributed by Chew Ah Fock or Chan Pak Woh or Ong Siang Tian for the full purchase price of the land save for the RM25,000 paid by Chan Pak Woh and Ong Siang Tian each; and

(f) the company cannot provide financial assistance for the issuance of its own ordinary shares to anyone.

Sections 67(1) and 123 of CA 1965 and *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661; [1997] 1 MLRA 593 were cited.

[49] If we refer to the CCM Table, 469,998 unit shares comprises new unit shares allotted to Chew Ah Fock — 328,999, Chan Pak Woh — 70,499 and Ong Siang Tian — 70,500.

[50] Counsel for Chew Ah Fock conceded there was no consideration contributed by Chew Ah Fock, Chan Pak Woh or Ong Siang Tian for the purchase of the land. Having made this concession, we are of the view that the argument of counsel for Chew Ah Fock on the amount of shares to be cancelled or expunged is 490,998 shares (RM1 unit per share) in prayer 4 of the OS as being not pleaded is rendered frivolous and is of no consequence. It is clear that the shares allotted as at 18 February 2009 is 469,998 unit shares as shown in the CCM table.

[51] Section 67(1) of the CA 1965 (material part) states:

> 67(1) Except as is otherwise expressly provided by this Act *no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company* or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares. (Emphasis added.)

[52] In *Abdul Manaf bin Mohd Ghows*, the facts, among others, are: The 1–10 appellants were the shareholders of Seri Naga Construction Sdn Bhd ('Seri Naga'). Seri Naga (vendors) with first respondent company, Nusantara Timur ('Nusantara') entered into a sale and purchase agreement to take over Seri Naga and to purchase the entire shareholding of Seri Naga for RM1m. Nusantara has paid only RM150,000 towards the purchase price and the balance of RM850,000 was to be paid within 60 days of the date of the sale and purchase agreement. Nusantara defaulted in their obligation and were sued by the vendors before the High Court and succeeded partially obtaining judgment for the balance purchase price of RM850,000, interest and costs. There was no appeal against this part of the judgment. The appeal before this court concerned the dismissal by the High Court of, among others, the vendors' prayer for damages against Nusantara. Seri Naga (not Nusantara) applied for a loan from KUBB and was approved a loan of RM850,000 (second loan) and one of the security is the property owned by Seri Naga was charged as security for the second loan for the repayment of RM850,000. KUBB did not disburse the second loan to Seri Naga. Apart from two specific reasons why there was no disbursement, this court held (p 596) as follows:

> [W]e consider the second loan to be a transaction caught by s 67 of the Companies Act 1965 as Seri Naga was indirectly providing financial assistance in the purchase of its own shares. KUBB must have entertained its own reservations on the legality of the second loan as expressed by condition 20 in its letter of approval ...

[53] Based on the concession made by Chew Ah Fock that in fact for the allotment of 468,998 unit shares, there was no consideration from the shareholders through capitalisation of the land, we agreed with the submission of the plaintiff that the purchase of the shares by the shareholders with the financial assistance provided by the company (whether directly or indirectly) is prohibited by s 67 of the CA 1965 as held by this court in *Abdul Manaf bin Mohd Ghows*.

[54] The learned judge held the following at para 37 of the grounds:

> 37. In all the circumstances, I would find there to be insufficient basis for exercise of discretion in favour of the plaintiff's action/claim based on the facts even if there was a cause for rectification, or expunging was a remedy allowed under the provisions of the Companies Act. The information relied upon by the plaintiff was incomplete and based on selective documents, which were specifically brought to

his attention like lawyer's receipts, which had been available all the while, or seemingly found in the course of liquidation exercise like no bank account, which did not give a complete overview of the company from the beginning.

[55] The learned judge was guided by the following dicta of this court delivered by Abdul Aziz JCA (as he then was) in *Pioneer Motor Service Co v Chin Cheng Hong Sdn Bhd* [2003] 3 MLJ 513 at p 519 as follows:

> To me it is also clear from our s 162(1) that the power to order rectification is discretionary, because even if a situation giving cause for rectification exists, such as that the name of any person is without sufficient cause entered in the register, the section says that 'the Court may refuse the application 'for rectification'] or may order rectification of the register'. *It is important to note that, according to Fullager J, some definite reason must be shown for refusing rectification before it will be refused.* (Emphasis added.)

[56] The facts in *Pioneer Motor Service* as per headnotes: The directors of the appellant company had approved the transfer of 156,400 shares to Constant Aim Sdn Bhd (a non-member), disregarding article 31 of the articles of association of the appellant company which provides that where a member wished to transfer his shares, all other members were to be given an opportunity to acquire the shares before they could be transferred to a non-member. The respondent, a member of the appellant company sought in the High Court a cancellation of the directors' resolution and rectification of the register of members under s 162 of the CA 1965. The respondent company's application was allowed. The sole question to be decided in the appeal by the appellant was the question of discretion under s 162 of the CA 1965.

[57] The dicta at para 55 above was opined by this court after having analysed *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1, a case cited before them in support of the submission that the discretion under s 162 of the CA 1965 ought not to be exercised in favour of rectification. One of the issues on appeal was the question of rectification of the register of members of a company under s 83(1) of the Companies Act 1936 (NSW) in respect of shares alleged to have been transferred in contravention of article 16 of the articles of association of the company, which prohibited the transfer of shares to non-members without their being first offered to the existing members at their fair value.

The appeal from the Supreme Court of New South Wales was heard before a panel of five judges of the High Court of Australia. Three judges held that the register should be rectified while one judge held the transfers were valid for a reason which did not have to do with any question of discretion whilst Fullager J was of the opinion that rectification ought to be rejected for two reasons, one of which rested 'on a broader ground of discretion'.

[58] In referring what is ' the definite reason' which must be shown for refusing rectification, this court at pp 519–520 referred to the circumstances that to Fullager J justified refusal of rectification (p 520):

> ln the present case three of the plaintiffs are themselves, in my opinion, wrongly on the register. Another, [Henry], was instrumental in their being so placed on the register. Neither the interests of the company nor the interests of any of the plaintiffs are in the slightest degree adversely affected by the presence on the register of the names to which objection is taken. The sole object of the plaintiffs is to obtain from [William] his assent to an alteration in a position in which, as I have said, [Henry] was glad enough to acquiesce in the days of the company's prosperity, and which has existed for nearly twenty-five years.
>
> After observing that the position was very like that which existed in *Sichell's Case* (1867) LR 3 Ch Appl 119, Fullager J concluded:
>
> > In all these circumstances, I am of opinion that rectification should have been refused unless the plaintiffs were prepared to agree to a corresponding rectification of the entries which were made in 1940, and this they have refused to do.

[59] This court was of the opinion that the decision of Fullager J ought not to be applied in the circumstances of the appeal before them as 'the facts in that case were different in the character of their layout and pattern and the facts in this case' (p 520 D-G). This court then dismissed the appeal and held there was no sufficient reason for refusing to exercise the power of rectification under s 162 (pp 517E–518D). In a nutshell, essentially the Court of Appeal agreed with the view of the High Court that on the facts of the case, the directors had blatantly disregarded article 31 of the articles of association without giving notice to the respondent and this was tantamount to riding roughshod over the rights and privileges of the respondent company as a member of the appellant company.

[60] It is our considered opinion that our findings of the allotment of the 21,000 unit shares to Chee Chooi Fun was invalid and was not in accordance to law and that the 469,998 unit shares issued by way of capitalisation was likewise invalid for the reasons discussed above was sufficient cause for this court to exercise its discretion to order the rectification of the share register.

CONCLUSION

[61] For all the foregoing reasons, we find there are merits in the appellant's appeal. The appeal was allowed. The High Court's order dated 26 September 2018 was set aside. All parties are to bear their own costs. A consequential order was made: the appellant is to file the necessary documents with the first respondent to reflect the true shareholding of the company as prayed in prayers 2 and 3 of the OS.

Appeal allowed with each party bearing its own costs.

Reported by Kohila Nesan